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# A FEW THOUGHTS ON JUDICIAL SUPREMACY: A RESPONSE TO PROFESSORS CARRINGTON AND CRAMTON

*Honorable Patrick E. Higginbotham†*

The efforts of Justices Sandra Day O'Connor and Stephen Breyer to provoke examination of the vitality of the American judiciary's independence have inspired two conferences,<sup>1</sup> which in turn have produced many thoughtful papers and much commentary. I have been asked to respond to one such paper offered by Professors Paul Carrington of Duke and Roger Cramton of Cornell.<sup>2</sup>

These two distinguished scholars see the Court as its own enemy, threatened by internal practices and changing relationships with state courts and the inferior federal courts. The authors decry this system because it enables, or at least facilitates, the Justices' present roles as "superlegislators." To their eyes, the Supreme Court is playing off the field, outside boundaries that, while hazy at their margins, have clear limits rooted in principles of separation of powers and judicial tradition. As the authors put it: "When judges assume the role of lawmakers, as when they impart principles into the Constitution that have scant textual base, or when they choose to disregard or stretch the text of valid legislation, they invite political accountability of the sort to which we subject our legislators."<sup>3</sup>

Although Professors Carrington and Cramton fall short of providing a complete remedy, their proposal lends definition to the ills it would treat. The authors start by offering a brief history of the Court's ascension. They then offer an example of superlegislation that they call "the absence of judicial independence caused by superlaw governing judicial elections."<sup>4</sup> They assert that "the Court has by its edicts made it virtually impossible for many states to assure the appropriate independence of their judiciaries," finding "[t]he impact upon the elections of judges, state constitutions require in order

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<sup>1</sup> Fair and Independent Courts: A Conference on Judicial Independence, Selection and Accountability, SMU Dedman School of Law (Apr. 4, 2007); Fair and Independent Courts: A Conference on the State of the Judiciary, Georgetown University Law Center (Sept. 28–29, 2006).

<sup>2</sup> Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 594 (2009).

<sup>3</sup> *Id.* at 587.

<sup>4</sup> *Id.* Part II.

to provide a measure of democratic accountability for their politicized judiciaries, has been especially consequential.”<sup>5</sup>

According to Professors Carrington and Cramton, much of the change in the inferior federal courts, appellate and trial, is linked to the Justices’ alleged roles as platonic guardians of constitutional values detached from the mundane daily duties of examining facts, applying law to facts, and explaining decisions. The authors identify “secondary effects on lower courts of the Supreme Court’s role as superlegislature,”<sup>6</sup> citing a litany of present ills of the lower courts. These ills range from their lack of transparency and reliance on unpublished opinions, to their increasing delegation of functions to expanding staffs and embrace of arbitration and declining trials. The authors point the finger at the Supreme Court for its decisions on fact pleading under Federal Rule of Civil Procedure 8 and its encouragement of motions for summary judgment under Rule 56. The authors suggest that changes such as excessive delegation to law clerks and staffs, coupled with declining oral arguments and trials, reflect emulation of the Court by the lower courts.

#### THE PROPOSAL

The proposal would withdraw much of the discretion of the Supreme Court to choose its own cases. Using the Act of February 13, 1925 (which replaced much of the Court’s mandatory jurisdiction with the writ of certiorari) as a baseline,<sup>7</sup> the authors compare the 330 cases per year the Court was then deciding with its present load of about eighty selected cases per year. They argue that this reduction is in large part a product of the delegation to the “cert pool” of law clerks by all Justices save Justices Stevens and Alito. They would

replace the “cert pool” of law clerks with a panel of experienced federal judges. These judges would be empowered to hear all petitions for certiorari and evaluate the petitions on the basis of standards supplied by Congress. They would place a specified and substantial number of cases on the docket of the Court, and the Court would be obligated to decide these cases their merits.<sup>8</sup>

This panel of judges, the “Certiorari Division of the Supreme Court,” would select 120 or so cases per year that the Supreme Court would be obliged to decide. This would leave the Supreme Court to pick another one hundred or so cases if it wished to do so. This body of judges would issue no rulings or opinions.

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<sup>5</sup> *Id.* at 609–10.

<sup>6</sup> *Id.* at 617.

<sup>7</sup> Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (current version codified as amended at 28 U.S.C. §§ 1251–94 (2006)).

<sup>8</sup> Carrington & Cramton, *supra* note 2, at 632.

The authors' proposal identifies five benefits. First, this new system "would restore the Supreme Court to the more judicial and less legislative role that it generally performed prior to 1925. The Justices, like real judges, would have to decide many cases placed on their docket."<sup>9</sup> With this return to mandatory jurisdiction the Court would once again work under the shelter of Chief Justice John Marshall's justification offered in *Marbury v. Madison*<sup>10</sup> for judicial power to review legislation—that the court was *obligated to decide*.<sup>11</sup> Second, the time saved by relief from the cert review process could be focused on the mandatory docket. Third, the selection of cases would be made by judges in the best position to know the issues of national law in need of attention. Fourth, it would add prestige to the federal appeals courts. Fifth, it would add transparency to the process of selecting cases for Supreme Court review. This might in turn encourage transparency in the inferior courts.

Despite these predicted benefits, Professors Carrington and Cramton's proposal rests on a singular premise: "[t]he power to decide what to decide was a major factor in the transformation of the Court in the last century as the Justices became noticeably less constrained in making political decisions."<sup>12</sup>

#### THE PERCEIVED WRONG

The title of the article suggests disquiet with the Supreme Court's present role of exercising power that properly lies with the Congress, the President, or the States. The description of its errancy points to an inability to treat lawmaking as an incident of dispute resolution. Instead, the Court is said to use cases and controversies to rule with an accent on prospective effects—making large social and political decisions to govern the future direction of the country.<sup>13</sup> The authors see this legislative role as arising in the post-1925 years of the twentieth century. The year 1925 is significant because it marks the virtual end of the mandatory jurisdiction of the Supreme Court, which the authors view as an enabling, if not a directly producing, cause of the judiciary's rise as a superlegislature. As their article puts it: "legisla-

<sup>9</sup> *Id.* at 634.

<sup>10</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>11</sup> *Id.* at 178 ("[I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.") (emphasis added).

<sup>12</sup> Carrington & Cramton, *supra* note 2, at 603.

<sup>13</sup> *Id.* at 590 (describing the Court as a "'superlegislature' that sits chiefly to proclaim new law to govern future transactions and relations") (citing Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court?*, 119 HARV. L. REV. 32, 35–39 (2005)).

tion allowing Justices to decide only those few legal and political issues that they choose to decide" is a "[s]ignificant element in the Court's role as superlegislature."<sup>14</sup>

Somewhat in tension with this 1925 marker,<sup>15</sup> the authors also point to Chief Justice Marshall's jurisprudence and the introduction of written opinions. They argue that states early on recognized the potential for judicial excess and therefore acted to rein in state courts with term limits and elective office. Similar responses were not directed to federal courts because they were part of a federal government that was viewed as largely ineffectual.<sup>16</sup> The authors observe that "[a]lmost no contested policy of substantial national concern that the Court announced in the nineteenth century was effectively maintained."<sup>17</sup>

The argument continues that in the early part of the twentieth century there was a general sense of inherent limits upon the range of governance deployed through judicial decision making in cases or controversies. But in 1947, that constraint fell away, or at least was eroded, with the success of the Court in the *Steel Seizure* case,<sup>18</sup> which set the stage for an emboldened Court's willingness to overturn *Plessy v. Ferguson*<sup>19</sup> in the school desegregation cases.<sup>20</sup> The authors continue that "[b]y 1961, the Court . . . was prepared to take on numerous other assignments," embracing Professor Sanford Levinson's observation that many lawyers and legal scholars had by this time come to think of constitutional interpretation "the way that the Catholic Church has traditionally thought of scripture as a text truly understood only by those high clergymen professionally invested in its interpretation."<sup>21</sup>

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<sup>14</sup> *Id.* at 591.

<sup>15</sup> As the authors indicate, the starting point for discretionary jurisdiction is best drawn from the Judiciary Act of 1891 (Evarts Act), ch. 517, 26 Stat. 826 (codified as amended at 28 U.S.C. § 43 (2006)), extended by the Act of Sept. 6, 1916, ch. 448, 39 Stat. 726.

<sup>16</sup> The Marshall Court's decisions, however, were also met with concern. "In the Marshall Court years, especially during the 1820s, those who perceived a tendency toward centralization in the Court's decisions proposed repealing section 25 of the 1789 Judiciary Act, which authorized Supreme Court review of certain state court judgments." Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 896–97 (1984).

<sup>17</sup> See Carrington & Cramton, *supra* note 2, at 599.

<sup>18</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

<sup>19</sup> 163 U.S. 537 (1896).

<sup>20</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>21</sup> Carrington & Cramton, *supra* note 2, at 603–04 (citing SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 46–50 (1988)).

## A BRIEF RESPONSE

Professors Carrington and Cramton's proposal creates two sets of problems. The first set raises concerns that go to the heart of the proposal to reign in the Supreme Court. The second set involves several of the specific concerns the authors see as traveling companions to the present excesses of the Court, such as the decline of trials and increasing morphing of federal trial courts to administrative-like courts.

At the outset I should disclose that I agree that most of the ills sought be remedied are real and troubling. Some of these ills, such as the changing work of the trial courts, pose serious challenges to their independence. Indeed, I see these changes as eroding the foundations of Article III. And while I remain doubtful of the effectiveness of the proposed remedy, I agree that allocation of the power to decide what to decide is a cardinal question: it enhances the Court's power to shape the law, a statement that is little more than a recognition of Arrow theory and the common sense intuition that the sequence of decisions matters a great deal. That said, to my eye, the article understates the timing tools at the hands of the Court operating under a regime of "mandatory jurisdiction," and their treatment of cases selected by others as appropriate for Supreme Court review.

Returning to first principles, I am uncertain whether the ills the proposal attempts to treat also include exceeding the jurisdictional grants of Article III and the consent of Congress. Regardless, any challenge to the justification of unelected and unaccountable officials in a representative republic must admit the existence of congressional power over the federal courts. That power is real. With it, Congress can withdraw appellate jurisdiction from or alter the size of the Supreme Court. And the specter of the Madisonian Compromise looms over the inferior courts, leaving open the possibility that Congress can destroy that which it created. That Congress lacks the political will to exercise its power is not an answer but a concession that in this most basic way the Court is not acting without congressional approval—or at least acquiescence.<sup>22</sup> Professors Carrington and Cramton tacitly recognize this reality, by proposing that Congress remedy the excesses

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<sup>22</sup> That tenured judges should enjoy such power, on the basis of "law" so understood, is to me a thing not to be accepted just because it was brought into being in 1788. Nor could I be satisfied with a fictitious or mystical "popular consent," not expressed in a positive way by the people's elected representatives. I think that the whole apparatus should be dismantled unless one can say (as I do say) that Congress, representing the democracy from year to year, right now in 1981 could seriously diminish this allocation of policy power to tenured judges, and has instead chosen, and still chooses, not to do so.

CHARLES L. BLACK JR., *DECISION ACCORDING TO LAW: THE 1979 HOLMES LECTURES* 26 (1981). I would add that this continues right now in 2009.

of the Court. I do not suggest that turning to Congress is not the correct path. Indeed, as the proposal stresses, the main culprit here is the consequences of legislation from the Evarts Act<sup>23</sup> to the Judges Bill of 1925.<sup>24</sup> So, abstractly, remedy and wrong are a neat fit. The reality of course is that gradual tailoring over an eight-decade span has complicated matters. The federal judicial apparatus in operation today, as distinguished from its 1925-charted form, is hardly recognizable.

Further, we have to ask what would result from this withdrawal. The proposal sheds some light on the answer in its description of what discretionary jurisdiction has wrought. Yet this is not a simple extraction. Answering this question requires us to identify the forces that have shaped the present model of a case or controversy. Identification would allow us to examine the assertion that much of the judiciary's change in shape is attributable not just to decisions of the Court, but to its decisions enabled by its power to decide what to decide.

We must further inquire into the effect of both congressional acts that tasked the judiciary with broad-gauged assignments as well as Supreme Court decisions that effectively turned back ombudsmen-like roles that the Congress, as the representative branch, would have had it assume.

Long before the Judges Bill, Congress looked to the federal courts to enforce its statutory norms by providing private rights of action. For example, in promulgating antitrust laws, Congress made broad statements outlawing any contracts, combinations, and conspiracies in restraint of trade, but left to the federal courts the task of giving content to trade regulation. Only later with the Clayton Act did Congress supplement governmental enforcement by granting a private right of action to persons injured in their trade or business by conduct violative of this general proscription.<sup>25</sup>

A century of "federal common law" followed, embodied by economic theory strained through the eyes of jurists and enforced in suits by "private attorneys general." This trend included securities, labor, and patent law, which all allowed for cases to be brought far removed from the classic binary model of common law litigation. This congressional use of the courts became so familiar that even when Congress did not directly provide a private remedy the Court would imply it. Eventually, rather than continue down that path—one that gave the

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<sup>23</sup> Judiciary Act of 1891 (Evarts Act), ch. 517, 26 Stat. 826 (1891) (codified as amended at 28 U.S.C. § 43 (2006)).

<sup>24</sup> Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (codified as amended at 28 U.S.C. §§ 1251–94 (2006)).

<sup>25</sup> See Clayton Antitrust Act of 1914 § 4, 15 U.S.C. § 15 (2006) (treble damages); *id.* § 16, 15 U.S.C. § 26 (injunctive relief).

Court a large say about social policy in a wide array of matters such as the environment, civil rights, and the stock markets—the Court told the Congress that any intent to have judicial involvement had to be clearly stated. This sounded the demise of implied private rights. The larger point is that it was the Congress that introduced the Court to these large social issues.

Not that the Court needed it. Recall that the *Lochner* era,<sup>26</sup> roughly 1905 through 1937, was discredited for its activist draw upon Darwinian-influenced economics to strike down New Deal legislation intended to jump start a failed economy. It is difficult to make the case that the Judges Bill was central to this aggressive run by the Court. Without diminishing the importance of the power to decide when to decide, it bears emphasis that with mandatory jurisdiction, the decision of when to decide passes—to the extent it passes to anyone—largely to counsel for litigants. And many of our landmark decisions from the Court came in “set up” cases such as *Plessy* itself.<sup>27</sup> Indeed, the NAACP largely controlled the timing of the attack upon the separate but equal holding of *Plessy*.

There is another side of the coin: the avoidance of decision during a time of mandatory jurisdiction. Recall the repeated efforts to have the Court review the constitutionality of the Reconstruction legislation. This effort to free the South from a congressionally imposed hegemony of dubious constitutionality was frustrated by the Court and the Congress.<sup>28</sup> For now I only remind of the familiar, that congressional use of private suits to enforce federal law brought federal courts into the day to day task of enforcing broad-gauged federal norms against private persons and businesses. This soon included enforcement against state and federal agencies.

The rise of the administrative state and the public law model of litigation is hardly the creature of the Supreme Court. Rather this rise was marked by judicial diffidence and not arrogation. Justice Stevens’ majority opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense*

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<sup>26</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); see also, e.g., *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923); *Hammer v. Dagenhart*, 247 U.S. 251 (1918)

<sup>27</sup> See CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987).

<sup>28</sup> See *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1868); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867). It bears mentioning that congressional withdrawal of habeas jurisdiction may well have taken the Court from the crosshairs of determined congressional assault. The power to decide what to decide is not always deployed to take charge of matters best left to the political branches. And while the Congress effectively let the Court off the hook in the *McCardle* affair, the Court has the tools to duck when it elects to do so even when jurisdiction is “mandated.” *Marbury* itself is a classic example. The Court’s wheeling out of abstention and the doctrine of clear statement are illustrative.



*Council, Inc.*,<sup>29</sup> one of the most important decisions of the Court in recent years, pulled the federal courts back from the lawmaking of administrative agencies. But this was not the first such exercise of modesty. The rise of the administrative agencies played a key, if not decisive, role in the growth of the doctrine of standing, a little known word as late as the early 1950s. The Court relied on the doctrines of justiciability in response to the increasing number of suits asking the federal courts to order governmental bodies to obey the law. These examples of judicial modesty do not necessarily undercut the assertion that the Court has, first in matters of personal liberties and more recently in matters of federalism, cut or stretched the tethers of constitutional text. Rather, these examples further inform the need for an appropriate remedy.

True to the commands of Article III and the principles of separation of powers, the Court in *Lujan v. Defenders of Wildlife*<sup>30</sup> insisted that a plaintiff have an injury caused by the government's conduct and that the injury not be suffered in common with all citizens. Equally important, the Court required that the injury be redressable by a favorable judgment. Against this backdrop of judicial caution of its role, Congress gave all citizens a right to sue to enforce the Endangered Species Act, a statute that imposed a duty upon federal agencies to consult with the Secretary of the Interior before proceeding with agency-funded projects that threaten endangered species. The *Lujan* Court found that the Act violated Article III in attempting to allow a citizen without direct, individual injury to enlist a federal judge as a virtual ombudsman. And while standing, abstention, and political question doctrines can be cast as efforts to garner control over case selection, resistance to mandatory decision making is not inevitably aggrandizing. A gentle reminder that the political question doctrine had its seeding in *Marbury* itself.

Historically, the Court has been on occasion modest in its vision of the judicial role and on other occasions self-aggrandizing. The latter is often read as a strong reaction to perceived incursions upon judicial turf. Think here of *City of Boerne v. Flores*.<sup>31</sup>

The rich path of the Equal Protection Clause is instructive. As the Court developed tiered levels of judicial scrutiny—strict, intermediate, rational basis, and rationality with a bite—it balked at extending the highest levels beyond race, to gender for example. Significantly, in *Washington v. Davis*,<sup>32</sup> by insisting that a party make a showing of purpose, which thereby negated the adequacy of showing effects

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<sup>29</sup> 467 U.S. 837 (1984).

<sup>30</sup> 504 U.S. 555 (1992).

<sup>31</sup> 521 U.S. 507 (1997).

<sup>32</sup> 426 U.S. 229 (1976).

alone, the Court turned back pleas for a greater judicial role in a range of social issues. It also refused to extend the list of fundamental interests that would trigger strict scrutiny, leaving these large problems to the political process.

This fluctuation between diffidence and aggrandizement across the Court's docket is not new. Recall the carve out of personal liberties made explicit in Justice, later Chief Justice, Stone's famous footnote four in *United States v. Carolene Products Co.*<sup>33</sup> While disavowing the *Lochner* line<sup>34</sup> of aggressive review of congressional efforts to regulate in the economic sphere, that footnote made plain that the Court would carefully scrutinize government conduct impacting personal liberties.

As for federalism, the Rehnquist Court's aggressive march from *Seminole Tribe of Florida v. Florida*<sup>35</sup> to the ultimate conclusion that state immunity from money damages is not grounded in the Eleventh Amendment after all, but was rather a presupposition of the Constitution, can be viewed as that Court's own carve-out. It is fair to question the role, if any, of case selection in both of these aggressive moves. In popular but misleading language, one moves in a liberal direction and the other moves in a conservative direction. Inevitably, I think, one's take on which, if either, of these two lines suffer the accused vice will be influenced by the "correctness" of the result and its fit with one's vision of the constitutional order of things. (The majority and dissenting opinions in the *Seminole Tribe* line of cases exemplify this tension.)

This is not a defense of the Court. It is rather to ask why we should assume that members of the bench, the bar, and the academy will not split somewhere along the same lines as the Court has, each side convinced that the others have "left the reservation" and are implementing a personal agenda. Is it that the whole enterprise was impermissibly political or that one was and one was not? These questions tax the implicit premise of Professors Carrington and Cramton's proposal that in matters of constitutional law there is one locatable and defensible path. Or perhaps more accurately, that outside boundaries are marked. But directions for the correct path to follow need to be more clear than urgings to adhere to the "the text of the Constitution" or to "read strictly" or "loosely." The proposal does not wade into the textualist debates or offer concrete advice beyond "go easy and slow and obey the constitutional commands." It rather would take back the power to decide when to decide for such value as it may have in checking the broad role of governance the Court has come to have; however, the authors intend to leave the Court be with

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<sup>33</sup> 304 U.S. 144, 152 n.4 (1938).

<sup>34</sup> See cases cited *supra* note 26.

<sup>35</sup> 517 U.S. 44, 54 (1996).

its internal debates in the cases that it must decide. They fail to provide any new discipline in the choice of issues in a case or in the writing of its opinions. While their article argues that the Court's political decisions have taken it into the political arena, which insists on accountability, the proposed remedy does not pretend to halt the occasional outlier. Mandatory jurisdiction is offered as a measure of remission at best, and as a pain killer at worst. But neither provides a cure of the illness.

Given these limits of the proposal, the invocation of *Brown v. Board of Education*<sup>36</sup> is a distraction. The article expresses concern for the constitutional footing of this decision, the results of which it of course applauds. It hints that the Court erred in cutting off bottom-up progress in race relations. All of this gave me, a child of the deep South, pause. First, if timing was the Court's mistake or otherwise an unfortunate product of the decision, how would a mandatory docket have changed things, given the plaintiffs' litigation strategy? Would a mandatory docket have forced a decision even earlier in frustration of the NAACP's strategy of moving slowly at the college level before turning to secondary education? If racial progress was moving apace without the support of the Court, mandatory jurisdiction could have in fact stifled that progress, which rested in part on the sequence of decisions exposing the reality of separate but equal. When to offer a frontal challenge of the *Plessy* doctrine was seen as a grave decision by leaders in the black civil rights struggle; lawyer Thurgood Marshall and leaders of the NAACP and Inc. Fund were not always of the same mind here.<sup>37</sup>

Additionally, it turns the questioning to the familiar interpretivist/non-interpretivist debate with hints that the decision is not defensible as a legal matter.<sup>38</sup> The *Plessy* Court read the Fourteenth Amendment one way; a half-century later, the *Brown* Court read it differently. It is impossible to locate a relevant and clear meaning of the Equal Protection Clause in text alone. Thus, the differences between the *Plessy* and *Brown* Courts lie only superficially with their treatment of structural inference and history. I am uncertain how the authors see this struggle.

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<sup>36</sup> 347 U.S. 483 (1954).

<sup>37</sup> See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63 (1988); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (2004).

<sup>38</sup> That has become a popular discussion point in Federalist Society meetings, in part I suspect because it tests the conservative mettle of young lawyers to cut the legs out from under an icon. See, e.g., Federalist Society for Law and Public Policy Studies, 2004 National Lawyers Convention, *Celebrating Brown v. Board of Education's Promise of Equality: How We Are We Doing Fifty Years Later?*, Nov. 11–13, 2004, Washington, D.C. I think it is a distraction here.

With the advantage of a long backward look, to my eyes the differences lie with the profound cultural changes coming in the nigh six decades separating the decisions, whether or not it makes one decision more appropriate for the judiciary than the other—unless, that is, one takes the view that *Plessy*'s acceptance of the legality of state separation of races properly found social neutrality in government insistence upon racial separation. Such a vision of state neutrality was then and is now an illusion, robbing of all content the assurance of equal protection of the laws for blacks, the heart of the Fourteenth Amendment. Separate but equal was always a fiction. The people knew it and the Court exposed it. *Brown* did not step on a growing underlying consensus of its falsity; rather, it tapped into it and by its decision released it from its legal trap. Unfortunately, *Brown*'s unearned credits for racial success has encouraged the academy's subscription to an aggressive judicial review, which when aimed in other directions, it would denounce—a point the article correctly makes. I find it difficult to fault the Supreme Court for saying no to a reading of the assurance of equal protection of the laws that would refuse admission to the University of Texas School of Law to a person solely because he was black.<sup>39</sup> Without that lesser step and the other predicate decisions, *Brown* would have been even more difficult. Professors Carrington and Cramton point to *Brown* as giving confidence to federal courts of the effectiveness of their decrees and fueling further excesses. This conclusion suggests that the claimed successes should not be credited to that decision. With that, if I am reading the article fairly, I can agree only in part. It is not that I see the Court as the sole or even the most effectual branch in pushing race out of the mix in government decision making. Rather, the premises of *Brown*, while not well put in the opinion, are straightforward and could not be escaped without leaving the constitutional assurance of equal protection empty of meaning. As Professor Charles Black summarizes them, the assurance was "that the Fourteenth Amendment is to be taken as generally condemning the infliction of harm, by law, on blacks as blacks, and that segregation by law, in the notorious circumstances prevailing, was a harm. These premises are a long way within the safe range of supportability in law."<sup>40</sup>

*Baker v. Carr*,<sup>41</sup> which came nine years later, is a better exemplar for the article's charge. That it had extraordinary impact did not strengthen the Court's warrant to decide it. This is because the Court chose one political theory of representation over another when both had constitutional legitimacy. As Justice Felix Frankfurter, joined by

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<sup>39</sup> *Sweatt v. Painter*, 339 U.S. 629 (1950).

<sup>40</sup> BLACK, *supra* note 22, at 33 (citation omitted).

<sup>41</sup> 369 U.S. 186 (1962).

Justice John Marshall Harlan II, put it: *Baker* was “in effect, a Guarantee Clause claim masquerading under a different label.”<sup>42</sup> That said, the political branch largely embraced the decision in voting rights legislation.<sup>43</sup>

Much of the difficulty is inherent in constitutional law itself. I am unsure how Professors Carrington and Cramton would prefer that the Court proceed. How for example ought the Court address the “liberty” protected in the Fourteenth Amendment? Should it have confined the guarantee of liberty by the Fourteenth Amendment to freedom from physical restraint? More to the point, for those persuaded that the present role of the Court ought to be cabined, how would mandatory jurisdiction offer any practical hope? The Fourteenth Amendment worked a constitutional revolution. It imposed constraints directly upon the states, enforceable by the Congress and by the courts when presented in the form of cases and controversies. The struggle over the relationship between the constraints upon the federal government and the constraints placed upon the states by the command that no state deny persons life, liberty, or property without due process of law was inherent—and in my view, inescapable—in the adoption of the Fourteenth Amendment. And I take Justice Harlan’s as the most defensible path in the incorporation debate.

The authors suggest that the role of the Court with forward-looking focus upon governance has infected the inferior courts; they suggest that both federal trial and appellate courts have avoided decision making by excessive delegation and by turning away cases summarily, moving toward a role of governance mirroring the Supreme Court. It is true that courts of appeal hear oral argument in an increasingly small percentage of their cases, decide a large number of cases without published opinion, and have attempted to deny precedential effect to them. The federal appellate courts also deploy large numbers of staff counsel and hand off administrative tasks to court clerks and circuit executives with their swelling staffs. Professors Carrington and Cramton also point to the employ of four law clerks by each circuit judge with delegation to these bright lads and lasses of much, sometimes all, of the opinion writing.

These assertions are accurate in my experience, although a bit overstated. They do not accurately describe the ways of all circuit judges. For example, I hire only two clerks. As for the increased role of staff counsel, the Fifth Circuit has more than fifty able lawyers in

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<sup>42</sup> *Id.* at 297 (Frankfurter, J., dissenting).

<sup>43</sup> There were, however, rumblings from the Congress. See, e.g., H.R. 11926, 88th Cong., 2d Sess. (1964) (proposing to withdraw Supreme Court jurisdiction over matters relating to apportionment); Robert B. McKay, *Court, Congress, and Reapportionment*, 63 MICH. L. REV. 255 (1964).

New Orleans alone. The growth is attributable to the large number of sentencing guidelines and other criminal appeals, as well as petitions for habeas corpus attacking state court convictions. While capital habeas petitions brought in the Fifth Circuit against state convictions demand much judicial attention, a significant percentage of the Fifth Circuit's docket needs staff attention but ultimately little judicial time. That said, there is no necessity for four law clerks in a circuit judge's chambers. And here I share the author's concern. There are larger concerns than these for the appellate courts, but those concerns are derivative of the changed role of the United States district courts, to which I now turn.

The present plight of the federal trial court did not suddenly spring upon us. Nearly thirty years ago I expressed dismay at the growing bureaucracy in the federal judiciary at a luncheon talk at an ABA Annual Convention.<sup>44</sup> I pointed to the tendency of administrative dispute resolution systems, created as alternatives to judicial roles, to emulate judicial models in defiance of the reasons for creating them. The successful effort of hearing examiners to be called "judges" was emblematic of this tendency. I thought then that magistrates and referees would follow, albeit with a better claim for a judicial role. I was correct in pointing to a movement of administrators toward judicial models. But I failed to grasp the full power of a confluent current pulling the district courts toward the administrative model. I was wary of the Magistrate Act's invitation to district judges to delegate, the justification being to free the district judges to try cases. Perversely, the magistrates, later "magistrate judges," an able group of lawyers, became the enablers of out of control civil discovery,<sup>45</sup> reducing the portion of trials the district judges were to handle. I did not immediately connect the confluence of the magistrate system and the 1938 Rules of Civil Procedure. Others, such as Professors Judith Resnik and Arthur Miller, have explained it well.<sup>46</sup>

The plain fact is that this system has promoted private litigation. In brief, the 1938 Rules took much of the case away from the courthouse and brought it to the conference rooms of law firms. At the same time, district judges turned much of the pretrial management of

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<sup>44</sup> Patrick E. Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980); see also Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405 (2002); Patrick E. Higginbotham, *Mahon Lecture*, 12 TEX. WESLEYAN L. REV. 501 (2006).

<sup>45</sup> For a larger discussion of this point, see sources cited *supra* note 44.

<sup>46</sup> The concept that escape from the technicalities of common law and equity pleading with pretrial discovery would facilitate settlement and reduce trials succeeded, but for profoundly wrong and unforeseen reasons: discovery became prohibitively extensive and expensive. See generally Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101 (2006).

the case to the magistrate judges. Rule 56 motions for summary judgment, aided by the famous trilogy from the Court, replaced the trial as the main event. Trial and pre-trial became increasingly disconnected, taking away the already vaporous standard of relevance in discovery—whether it “could lead to admissible evidence.” The processing of cases with little or no expectation of trial became quite familiar to district courts as they handled thousands of suits filed by prisoners pro se. The result was a large docket with few trials.

These large numbers of cases, most decided on paper with no hearings, move through the court system, ground out by successive layers of staff council and law clerks. Into this mix came globalization, which with the growth in transnational business transactions gave life to the arbitration of complex matters.

That the decisions of the Court have played some role, perhaps a large role, in this complex of circumstances, is plain. I would point by way of example to the Court’s high-casual reduction of the size of the civil jury, from twelve to six persons, and its overlong tolerance of punitive damages, which alone contributed greatly to the destabilization of jury trials. This is not to rehearse the debate; it is to make the modest point that the power of the Court to decide what it will decide is not a major factor in the changes that I am persuaded are of grave consequence. Professors Carrington and Cramton charge the Court with part of the responsibility for these evils, pointing to decisions embracing arbitration. While I agree that these decisions assisted the precipitous decline of trials, I do not see the changing role of district courts in hierarchical terms so much as a move of the entire judicial system toward a European civil law model.

There is much afoot here and I have no easy fixes to suggest. The causation is nuanced and difficult to disentangle. Nevertheless, the reality of these trends is undeniable. We all see the symptoms. It is etiology that eludes.

If the decisions of the Court challenged in the article do not represent popular will, Congress has the power to rein in the Court. The difficulty is that in exercising its power, Congress may well turn the Court from its present role, which could generate unforeseen collateral risk to matters that are not at issue and for which there is no consensus for change. A legislative consensus in support of a Supreme Court decision resolving a constitutional issue does not validate it. It does, however, tend to reduce the interest in any possible congressional response.

#### WHERE WE ARE

There is a powerful argument that the Court’s overly aggressive judicial review has done much harm. Professor Robert Nagel’s

thoughtful book states it well, and I will not rehearse it here.<sup>47</sup> My disagreement with the article is that I am not persuaded of the proposed remedy. Nonetheless, the article is a provocative and useful enterprise because it provokes examination of judicial review. In the long term the Court will be reined in only when judges are refused iconic status for imposing outcomes on the citizenry that are often little more than the moral vision of unelected officials. The assumption is that circuit judges, because they will only select cases for decision by the Court, will be free of the impulses that lead to judicial excess. The strengths and weaknesses of the Court's constitutional jurisprudence has been the subject of an extraordinary amount of discussion—in the public press, the law reviews, and the myriad scholarly publications. The legal academy has left little unturned or unexamined. The ill the proposal would remedy has been at the center of this swirl. The author's proposed remedy is attractive because it would lessen the discretion of the Court to decide what it will decide rather than urge the Court to follow different approaches to its work that might afford discipline to a more modest, less legislative role. Regrettably, however, this leaves the proposal's likely effectiveness largely unaddressed. It bears mention again that the Court not only wrote the Judges Bill; it lobbied hard for it too. The Court effectively transformed the cases left in place by Congress under mandatory jurisdiction into a discretionary docket by its use of summary affirmance and insistence upon a showing of a "substantial" federal interest. This brought about the demise of the three-judge courts. Meanwhile, the Court obtained virtually complete power to decide what it would decide, which was an easy sell to Congress. After all, Congress was only validating an operating reality.<sup>48</sup> The point is that one should not underestimate judicial power defensively deployed by nine very able lawyers supported by very able staff; nor should one underestimate the Court's predictably aggressive defense of its domain.

Relatedly, the assumption that cases selected for review by circuit judges would differ markedly from those the Court itself would select merits examination. Perhaps the assumption is correct, but this system will offer little restraint to the Court when it decides the selected cases, which by most selective criteria will be rich material for an aggressive Court. The cases the article decries were pushed upward by significant political forces. The question was not whether they

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<sup>47</sup> ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 148 (1989).

<sup>48</sup> See *Massachusetts v. Missouri*, 308 U.S. 1 (1939); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971) (claiming power to decline to exercise original jurisdiction as long as it would not disserve any of the principal policies underlying Article III). The *Wyandotte* doctrine was extended in *Arizona v. New Mexico*, 425 U.S. 794 (1976), to a grant of exclusive jurisdiction under 28 U.S.C. § 1251(a) (2006).



presented questions of national importance. Rather, the question was who ought to decide them and when. I am not persuaded that few, if any, of the decisions relied upon would not have reached the Court under the proposed rearrangements. The very process of decision making by the Court has conformed to its role of governance. A circuit screen will not reach this ingrained process.

As Professor Nagel has explained, it is in the conception of legal principles preliminary to their application that policy choices are made: "[M]uch of the Justices' intellectual energy is not directed at the actual resolution of cases at hand. It is directed at the difficult, complex, but preliminary, issue of determining the proper test to be applied in a defined class of cases."<sup>49</sup> This type of decision making "emphasizes the personal responsibility of the judges at the level of policy determination." He continues that "the modern Court's emphasis on doctrine selection expresses and consolidates a radical shift in role from adjudicator to regulator."<sup>50</sup>

So, it is fair to ask, is the objective of the proposal unattainable? The Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* stated:

Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and *speak before all others for their constitutional ideals*.<sup>51</sup>

Must we accept this stunning assertion?

My answer is no. While I do not see the excesses of the Court in apocalyptic terms, I must agree that over the past seventy or so years there has been a steady flow of power from the Executive and Legislative branches to the Court. Yet, much of this flow has occurred through delivery rather than judicial usurpation. At the same time,

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<sup>49</sup> NAGEL, *supra* note 47, at 148.

<sup>50</sup> *Id.*

<sup>51</sup> 505 U.S. 833, 868 (1992) (emphasis added); see also Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 347 (1994). Professor Eisgruber's article aptly opens by contrasting this quotation from *Casey* with a 1861 statement of Abraham Lincoln:

[I]f the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

See Eisgruber, *supra*, at 347 (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in INAUGURAL ADDRESSES OF THE PRESIDENT OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989, S. DOC. NO. 10, 101st Cong., 1st Sess. 133, 139 (1989)).

this movement to the Court has been uneven. To my eyes legal doctrine and principle afford the more powerful restraints; there are doctrines and approaches to decision making that cabin the well-intentioned, solution-driven justice. And here, along with the courts, the academy has had substantial influence. In recent years the response of persons sharing Professors Carrington and Cramton's concerns have urged restraint as a doctrinal base, drawing upon the work of Justice Frankfurter and Professor Bickel, among others.

That is not to say that such principles have not themselves been abused. There is an argument, fair as far as it goes, that runs as follows: Restraint was once the conservative mantra, at least when the Court was seen as being aggressively left of center. But conservatives became less interested as the locus moved to a more centrist and right path. That is, the doctrine of judicial restraint came to have little purchase with those in the majority. To undo "legislative" decision by the federal courts was not seen to violate the conservative principle of judicial restraint. Here the academy can be faulted as well, to the extent that it embraces outcomes it likes at the price of overlooking the reasoning and aggressiveness of the Court. *Brown v. Board of Education* is often highlighted here. As I have explained, the Court's invalidation of "separate but equal" is defensible although some of its "implementing decisions" as well as many of the lower court decisions that the Court refused to review are good examples of what happens when desired results cloud decisional principles in the hands of academic reviewers. *Baker v. Carr* is a better example. The point is that you cannot have it both ways if you claim restraintist principles, and not just expeditious political tools.

#### CONCLUSION

All of these principles and interpretive mantras have their utility as well as their limits. A focus upon structure, constitutional text, and history is an important part of defining the meaning of the Constitution despite the reality that the text is most often open-ended and history only a second puzzle to solve the first.<sup>52</sup> There is also the real-

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<sup>52</sup> In general, historians recognize more than jurists and legal scholars that history will rarely itself be stable or immune from change and contestation. See C. VANN WOODWARD, *THINKING BACK: THE PERILS OF WRITING HISTORY* 3-4 (1986) ("Mr. Justice Holmes, we are told, cherished a quotation from Henrik Ibsen. 'Truths,' said the playwright, 'are by no means the wiry Methuselahs some people think them. A normally constituted truth lives—let us say—as a rule, seventeen or eighteen years; at the outside twenty, seldom longer. And truths so stricken in years are always shockingly thin.' . . . Historians, perhaps more than some other truth seekers and vendors, may resent ascription of such ephemerality to the truths of their trade, particularly truths of their own devising. As for myself, I do not for a moment accept it in any literal sense. That is not to deny, however, that the older and more experienced historians will in their time have seen enough normally constituted truths come and go, wither and fade, to recognize in Ibsen's pronouncement an element

ity that the historical record of the Convention of 1787 and the ratification of the Constitution and its Amendments is far from complete.<sup>53</sup> The decisional enterprise must confront these realities in discerning the constitutional value and apply it to contemporary affairs. While a difficult path to travel, even to objective, non-tendentious eyes, it is a necessary path to secure the Constitution's textual tethers.

Significantly, the effort here differs from common law decision making in one critical respect. The value choice must be that of the organic instrument. Once made, the cases that follow will be decided by common law, analogical reasoning—the claimed skill of the lawyer. Absent firm legislative guidance, a common law court will make the value choice itself, such as by adopting comparative fault and rejecting contributory negligence. By contrast, with constitutional questions, there is a threshold inquiry the Court is duty bound to make: must we decide this constitutional question in order to discharge our duty to decide the case before us? The question then is not that this case affords an *opportunity* to decide; rather, it is whether the case *demand*s it. I call this strong version versus weak version *Marbury*, and it lies at the heart of the ill the authors' proposal would remedy. Chief Justice Marshall's claimed justification in *Marbury* is available only to those decisions that adhere to this restraint—regardless of who decides whether the Court decides a case. The marble palace sits as a temple on the hill isolated and removed from the tumult of daily events. It presents a sense of timeless disinterest and detachment stirring our inner yearnings for dispassionate justice, offering a rule of law that implements settled expectations.

Although aspirational, this is misleading. The Court is not so detached today, and it never has been. Like it or not, it is better seen as resting on an ethos of the people that has flowed as a river across our history. An ethos of commitment to the rule of law, of fair treatment for all persons before the courts. An ethos that offers a secular framework to bring order to a disorderly world. It is a powerful force whether viewed as tradition and custom, or as I do, the critical ethos that makes law work. A constitution set apart from this ethos would be brittle indeed. A look at the Brazilian constitutions, any of them, when laid over the reality of its government, is instructive. The tolerance of executive power runs throughout that country's long history, and the separation of powers expressed in their constitutions are betrayed by its longstanding toleration of generals-in-charge. The Amer-

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of truth about truths, even the truths of history. Those historians who have worked at their calling long enough to acknowledge responsibility for ideas past the alleged normal lifespan will have cause for personal reflections.”).

<sup>53</sup> For these materials and their attendant difficulties, see James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986).

ican ethos just as powerfully poses its demands for freedoms and democratic government.

The Court is a captive of this ethos. While its decisions may stray along the way, these forces external to the Court will have their way. The enterprise of examining structure, text, and history in no small measure would tap into this ethos. But that is a far more difficult task for the judiciary. It comes more easily to the representative branches, over time. That said, the judicial branch in my view is not the sole arbiter of constitutional values. All three branches have that task and all make law. Nevertheless, the courts are the most competent to resolve cases, and in doing so, they make law.<sup>54</sup>

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<sup>54</sup> Eisgruber, *supra* note 51.

